In the District Court of the United States for the Western District of Virginia

CIVIL NO. 145

OTIS EVANS, T/A OTIS EVANS TRUCK LINE,
PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree dated March 30, 1946, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission. Petition for appeal was apparently filed on May 30, 1946, and order allowing appeal filed on June 17, 1946, and certain appeal papers were served on June 3, 1946.[1]

[1] Copies of petition for appeal, notice of appeal, and assignment of errors were served on June 3, 1946; order allowing appeal was served on June 19, 1946; and jurisdictional statement and statement directing attention to paragraph 3 of Rule 12 were served on June 28, 1946.

The Commission's order dated March 29, 1945, denied appellant's application for a certificate as a motor carrier under the "grandfather clause" of Section 206 (a) of the Interstate Commerce Act as amended (49 U. S. C. 306 (a)). Appellees submit that the appeal presents no substantial question, and that the decree of the District Court should be affirmed.

The only question arising on this appeal [2] relate to the weight of the evidence. Not only is it a well-established principle that the burden of proof is upon the applicant [3] and that the determination of the weight and credibility of evidence is an administrative function entrusted to the Commission and not to the reviewing court,[4] but the record

[2] No specific issues are set forth in plaintiff's assignment of errors or statement of points to be relied upon.

[3] *Alton Railroad Company* v. *United States*, 315 U. S. 15, 25; *Gregg Cartage Company* v. *United States*, 316 U. S. 74, 83; *Akin* v. *United States*, 62 F. Supp. 391, 396 (W. D. La., 1945), aff'd March 11, 1946.

[4] *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 484, 490; *United States* v. *Pan American Petroleum Corporation*, 304 U. S. 156, 158; *B. & O R. R. Co.* v. *United States*, 298 U. S. 349, 359; *Merchants Warehouse Company* v. *United States*, 283 U. S. 501, 508; *C. R. I. & P. Railway* v. *United States*, 274 U. S. 29, 33–34; *Assigned Car Cases*, 274 U. S. 564, 580; *Loving* v. *United States*, 32 F. Supp. 464, 467 (W. D. Okla., 1940), aff'd 310 U. S. 609; *Transamerican Freight Lines* v. *United States*, 51 F. Supp. 405, 410 (D. Del., 1943); *Fish Transport Company, Inc.* v. *United States* (D. Mass.), decided December 22, 1944. In *Wright* v. *United States*, 50 F. Supp. 758 (W. D. N. C., 1943), the court upheld the Commission's decision in a case involving spurious documentary evidence. The rule that it is for

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in the case at bar discloses that, as stated in the District Court's opinion, "The oral testimony of the applicant and his witnesses is generally vague and indefinite. As to his documentary evidence, it is euphemistic to say that many irregularities appear therein. Indicia of actual alterations of documents are numerous."

In view of the inadequate and spurious evidence offered in support of the application, it is clear that the Commission's decision rests upon a "rational basis" and should not be disturbed upon judicial review. *Mississippi Valley Barge Line Company* v. *United States,* 292 U. S. 282, 286–7; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146.

That applicant's evidence was not credible and convincing appears plainly from the review of typical instances discussed in the District Court's opinion. The Commission's report likewise contains a careful analysis of the record. As the Commission found, the testimony of applicant and his witnesses as to the character and scope of his motor carrier operations during the critical period is "very general and, on cross-examination, his testimony in the main is evasive." In addition to its inherent weakness, applicant's case was affirmatively discredited by the fact that ser-

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the Commission to determine what weight, if any, shall be given to the testimony is particularly applicable in such cases.

ious discrepancies and alterations of documents were disclosed at the hearings.

It would be superfluous to analyze the record at length for the purpose of elaborating upon the instances where the untrustworthiness of applicant's evidence is revealed. The illustrative examples contained in the opinion of the District Court and in the Commission's report are sufficient to show that the Commission was exercising its sound discretion in denying appellant's application.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the decree of the District Court should be affirmed.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

JULY 1946.

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